Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1028

MARVIN MANDEL, W. DALE HESS, HARRY W. RODGERS, III, WILLIAM A. RODGERS, IRVIN KOVENS AND ERNEST N. CORY, JR.,

Petitioners,

v.

EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT, COMPOSED OF CHIEF JUDGE CLEMENT F. HAYNSWORTH, JR. AND CIRCUIT JUDGES JOHN D. BUTZNER, JR., DONALD RUSSELL, H. EMORY WIDENER, JR., KENNETH K. HALL, JAMES DICKSON PHILLIPS, FRANCIS D. MURNAGHAN, AND JAMES M. SPROUSE,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

ARNOLD M. WEINER,
RICHARD V. FALCON,
36 South Charles Street,
Baltimore, Md. 21201,
Counsel for Marvin Mandel, Petitioner, and of Counsel for Petitioners,
EUGENE GRESSMAN,
School of Law,
Univ. of North Carolina,
Chapel Hill, N. C. 27514,
Of Counsel for Petitioners.

M. ALBERT FIGINSKI,
Counsel for Marvin Mandel, Petitioner
WILLIAM G. HUNDLEY,
Counsel for W. Dale Hess, Petitioner
THOMAS C. GREEN,
Counsel for Harry W. Rodgers, III, Petitioner
MICHAEL E. MARR,
Counsel for William A. Rodgers, Petitioner
NORMAN P. RAMSEY,
WILLIAM F. GATELY,
Counsel for Irvin Kovens, Petitioner
CHARLES G. BERNSTEIN,
WM. BRADFORD REYNOLDS,
Counsel for Ernest N. Cory, Jr., Petitioner

The Daily Record Co., Baltimore, Md. 21202

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Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Pursuant to this Court's Rule 31(1), the petitioners move the Court as follows:

1. They move the Court for leave to file the petition for a writ of mandamus hereto attached. The issuance of such a writ by this Court is authorized by 28 U.S.C. § 1651(a).

2. They further request that an order and rule be entered directing all active Circuit Judges of the United States Court of Appeals for the Fourth Circuit, qualified to sit in this proceeding as an en banc tribunal, to show cause why a writ of mandamus should not be issued

against them in accordance with the prayer of said petition, and why the petitioners should not have such other and further relief in the premises as may be just and appropriate.

Respectfully submitted,

ARNOLD M. WEINER,
RICHARD V. FALCON,
36 South Charles Street,
Baltimore, Md. 21201,
Counsel for Marvin Mandel,
Petitioner, and of Counsel
for Petitioners,
EUGENE GRESSMAN,
School of Law,
Univ. of North Carolina,
Chapel Hill, N. C. 27514,
Of Counsel for Petitioners.

M. ALBERT FIGINSKI,
Counsel for Marvin Mandel, Petitioner
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Respondents.

PETITION FOR WRIT OF MANDAMUS

The six petitioners in this proceeding request that an original writ of mandamus issue from this Court, in accordance with the prayer herein, directed to those active Circuit Judges of the United States Court of Appeals for the Fourth Circuit qualified to sit in this proceeding as an en banc tribunal: Chief Judge Clement F. Haynsworth, Jr. and Circuit Judges John D. Butzner, Jr., Donald Russell, H. Emory Widener, Jr., Kenneth K. Hall, James Dickson Phillips, Francis D. Murnaghan, and James M. Sprouse.

OPINIONS BELOW

On January 11, 1979, after consideration of the case by a three-judge panel, the Fourth Circuit issued an opinion and judgment vacating the judgments of conviction and remanding for a new trial. The opinion is reported at 591 F.2d 1347 and is reprinted at pages 17a through 67a in the appendix to the petition for certiorari being filed simultaneously herewith. The judgment of the court is also reprinted in the appendix to the petition for certiorari at page 16a, as well as in the appendix to this petition for writ of mandamus, p. 1a, *infra*.

On July 20, 1979, following a rehearing en banc, an equal division of the Fourth Circuit entered a per curiam order stating that the judgments of conviction "are affirmed by an equally divided court." That per curiam order, together with a dissenting opinion, is reported at 602 F.2d 653 and is reprinted at page 7a of the appendix to the petition for certiorari and in the appendix hereto, at page 3a, *infra*.

On November 1, 1979, upon consideration of the petitioners' petition for a further rehearing en banc, the enlarged Fourth Circuit, again by an equally divided vote, ordered that the petition be denied, "it appearing that fewer than a majority of them [the judges in regular active service] have voted for it". This order, which was accompanied by a dissenting opinion and a dissenting statement, has not yet been reported. The order and the dissenting remarks are reprinted at pages 1a through 5a in the appendix to the petition for certiorari. The order and dissenting remarks are also reprinted in the appendix hereto, pp. 12a-16a, *infra*.

JURISDICTION

The judgments and order relevant to this petition for writ of mandamus were entered on January 11, 1979, July 20, 1979, and November 1, 1979, respectively.

There are no filing time requirements with respect to a motion for leave to file a petition for writ of mandamus, or with respect to the petition itself, but this mandamus motion and petition are being filed simultaneously with a petition for writ of certiorari. On November 20, 1979, the Chief Justice signed an order extending the time for filing the petition for writ of certiorari to and including December 31, 1979.

The jurisdiction of this Court to issue an original writ of mandamus is invoked under 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED

1. Does an equal division of all active circuit judges of a federal court of appeals have power or jurisdiction to exercise any of the en banc rehearing powers conferred by 28 U.S.C. § 46(c) on the majority of active circuit judges of a circuit?

2. Does an equal division of the active circuit judges of a federal court of appeals have power to affirm judgments of conviction entered in a district court where those judgments have been previously vacated by majority action of a court panel and where the judgment entered on the panel decision has not been vacated by a majority of the active circuit judges?

3. On a federal criminal appeal, when a conviction has been vacated by a panel judgment, and rehearing en banc has been ordered without vacating the panel judgment, does an equal division upon rehearing en banc constitute an affirmance of the unvacated panel judgment or an affirmance of the vacated judgment of the district court?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 46(c):

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three

judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. The court in banc shall consist of all circuit judges in regular active service.

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28 U.S.C. § 1651(a):

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

This petition for a writ of mandamus requests that the writ issue from this Court directing all Circuit Judges of the Fourth Circuit who are in regular active service and who are qualified to sit in these proceedings (1) to vacate the en banc's per curiam order of July 20, 1979, to the extent that it purports, by an equally divided vote, to affirm the judgments of conviction entered by the District Court for the District of Maryland, and (2) to reaffirm and give effect to the prior panel judgment of January 11, 1979, that has never been vacated, reversed, altered or amended in any way by action of a majority of all the Circuit Judges of the Fourth Circuit in regular active service and qualified to sit.

The facts, circumstances and trial proceedings that led to the entry of the judgments of conviction are more fully set forth in the petition for certiorari filed simultaneously with this petition for mandamus. Suffice it here to say that those judgments, entered after an extended retrial before a jury, and after two weeks of jury deliberation, reflected the jury verdicts that the six co-defendants, petitioners herein, were guilty of various

charges of mail fraud (18 U.S.C. §1341) and of prohibited racketeering activity (18 U.S.C. §1961, *et seq.*). Severe jail sentences and fines were imposed. In addition, the District Court, acting pursuant to 18 U.S.C. §1963(a), ordered the forfeiture of the "full ownership interests" that some of the petitioners held in the Marlboro racetrack enterprise involved in their alleged "pattern of racketeering activity."

The judgments of conviction and the forfeiture order were entered by the District Court on October 7, 1977. The petitioners duly noted their appeals to the Fourth Circuit. The United States also took an appeal from the District Court's post-trial order that decreed judgments of acquittal on Count 23 of the indictment, the jury having returned verdicts of guilty thereon. Count 23 had alleged that three of the petitioners had engaged in a "pattern of racketeering activities" in the course of conducting the affairs of an enterprise known as Security Investment Company. All these appeals were consolidated for hearing and determination by the panel of the Fourth Circuit to which they were assigned.[1]

Thereafter ensued a sequence of appellate events that is both remarkable and unparalleled in the history of the federal judicial system. In sequential order, those events may be summarized as follows:

(1) On January 11, 1979, the three-judge panel, dividing 2 to 1, entered a lengthy opinion and a judgment that resolved three matters favorably to the petitioners, i.e., the judgments of acquittal on Count 23, the judgments of conviction on the other counts, and

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[1] The Fourth Circuit panel assigned to these appeals was composed of Circuit Judges Butzner, Russell and Widener. The majority opinion was written by Judge Widener, joined by Judge Russell. Judge Butzner wrote a dissenting opinion. 591 F.2d 1347.

the order of forfeiture. As stated in the formal judgment entered on that day, see p. 1a of the appendix hereto, the court ordered

> ". . . that the judgments of acquittal on Count 23 of the indictment are affirmed. The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are vacated and remanded for a new trial; the order of forfeiture is also vacated and remanded, consistent with the opinion of this Court."

The majority opinion dealt at some length, 591 F.2d at 1374-1376, with the Government's appeal from the judgments of acquittal on Count 23. Indeed, Judge Butzner's dissent made no mention of any disagreement with the disposition of that appeal by the majority. The court's judgment affirming the judgments of acquittal on Count 23 was thus unanimous. But the major portion of the majority opinion dealt with two propositions: (a) a rejection of petitioners' contention that their prosecution and conviction under the mail fraud statute constituted an unwarranted overextension of that statute and an impermissible federal intrusion into the political affairs of the State of Maryland (591 F.2d at 1357-64), and (b) a determination that the trial judge had committed at least three reversible errors in his instructions on the mail fraud counts and in his admission of certain hearsay testimony and a state code of ethics (591 F.2d at 1364-1374). Judge Butzner disagreed only with proposition (b).

As to the order of forfeiture, the majority opinion merely stated that since the judgments of conviction on the various counts other than Count 23 were vacated and remanded for a new trial, it "follows" that the order of forfeiture must also be vacated and remanded (591 F.2d at 1376). Judge Butzner's dissent made no mention of the forfeiture order.

The disposition of petitioners' appeals for reversible trial errors made it unnecessary for the panel majority to address or resolve numerous other constitutional, statutory and procedural issues raised on the appeals. Left untouched, for example, were serious questions raised as to the construction and application of the anti-racketeering statute with respect to those who are not connected with organized crime operations, as well as serious questions about the constitutionality of the "forfeiture of estate" mandated by § 1963(a) of that statute.

(2) The January 11th opinion and judgment of the court have never been vacated, withdrawn, altered or otherwise rendered ineffective, in whole or in part. No order to that effect has ever been entered by the Fourth Circuit, sitting either as a panel or en banc. For all intents and purposes, the court's judgment of January 11th remains in existence to this day, awaiting appropriate execution.

(3) On February 23, 1979, the Government timely filed a petition for rehearing, with a suggestion of rehearing en banc. The Government carefully directed its petition for rehearing only to those portions of the panel's judgment and opinion that dealt with the reversible errors committed with respect to the jury instructions and the admission of evidence. No rehearing was sought as to the panel's determinations that (a) affirmed the judgments of acquittal on Count 23,[2] or (b) vacated the order of forfeiture. Moreover, the Government did not seek rehearing or further hearing of any of the arguments of petitioners that had been rejected or that had not been reached by the panel. Some of those

[2] Since the Government did not seek rehearing of that portion of the January 11 judgment that affirmed the judgments of acquittal on Count 23, and since the Government did not seek certiorari therefrom, that portion of the judgment is final.

unresolved issues, as Circuit Judge Widener was later to point out, "may present possible grounds for reversal." See 602 F.2d at 657.

Thus the Government did not construct its petition for rehearing so as to open all the original appeals to *de novo* consideration. It sought rehearing only as to those jury instruction and evidentiary matters that the panel found were impregnated with reversible error. Indeed, the Government persisted throughout the rehearing proceedings in its limited view as to the issues open for reconsideration. The Government filed no further brief before the en banc tribunal, preferring to rest its case on its objections to the jury instruction and evidentiary rulings as expressed in its petition for rehearing. Nor did the Government present any oral argument on other issues.

(4) On April 16, 1979, after having requested the petitioners to file a response to the petition, the Fourth Circuit entered an order granting rehearing en banc. This order did not vacate the panel judgment entered on January 11. And the order did not purport to restore the appeals on the docket as if they were pending and unresolved appeals.[3]

(5) On June 5, 1979, oral argument on the rehearing was had before six judges of the Fourth Circuit in regular active service. The total number of Circuit Judges in regular active service at this time was seven, but one of them (Circuit Judge Winter) had disqualified

[3] In its entirety, the April 16 order reads as follows:

"The appellee's petition for rehearing and suggestion for rehearing en banc, along with the response to the petition have been submitted to the court. Upon a poll, a majority of the judges eligible to vote, voted to grant rehearing en banc,

"IT IS, therefore, ORDERED that rehearing en banc is hereby granted.

"IT IS FURTHER ORDERED that the above cases will be reheard at the June 1979 Session."

himself from participating in these cases. Moreover, while Congress had earlier authorized three additional Circuit Judges for the Fourth Circuit (Public Law 95-486, 92 Stat. 1629), raising the total of regular active judges to ten, none of the three had taken places on the bench at the time of the oral argument. Thus the en banc rehearing was heard and determined by Chief Judge Haynsworth and Circuit Judges Butzner, Russell, Widener, Hall and Phillips.

The oral argument was devoted solely to the narrow issues raised in the Government's petition for rehearing, although the petitioners had filed a supplemental brief on the rehearing that argued that the judgments of conviction could not be reached without addressing and resolving the various other issues raised by petitioners on their original appeals.

(6) On July 20, 1979, an equal division of the six-judge en banc Fourth Circuit rendered the following per curiam order (602 F.2d 653):

> "The judgments of conviction are affirmed by an equally divided court.
>
> "A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.
>
> "AFFIRMED"

The per curiam order made no reference whatever to the January 11th judgment of the panel, and did not purport to vacate or withdraw that judgment or the opinion that accompanied it. The judgment that accompanied the per curiam order routinely stated, without reference to the en banc nature of the proceedings, that it is "here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed." Like the per curiam order, the

judgment made no reference to the earlier judgment of the panel. See appendix hereto, page 2a, *infra*.

Circuit Judge Widener, joined by Circuit Judge Russell, filed a dissenting opinion, indicating that "the lack of a bribery instruction for the mail fraud counts" was the point on which there was equal division. The identity of the other judge who voted with Judges Widener and Russell to make the equal division was not revealed by the court.

The per curiam order does state that a "majority of the members of the *en banc* court would affirm the judgments of conviction against all of the claims of the appellants" except the claim of error on which there was equal division. Presumably, that majority consisted of four of the six Circuit Judges participating in the en banc rehearing. But it is unclear whether this ruling against "all of the contentions of the appellants" was meant to apply only to contentions raised with respect to the limited issues in the Government's petition for rehearing, or whether it reflects a resolution of all contentions made as to all issues raised by petitioners on their original appeals. Those latter issues, of course, were not within the scope of the rehearing petition, and they were not reargued by the Government on the rehearing.

(7) On August 3, 1979, the petitioners filed a "Petition for Rehearing With Suggestion for Rehearing Before Fully Constituted Court In Banc." This petition was addressed to an en banc court that by now had a full complement of nine active judges. Shortly after the issuance of the July 20 per curiam order, two of the three newly authorized additional judgeships were filled by Circuit Judges Murnaghan and Sprouse. But with Circuit Judge Winter still disqualified, the qualified number of active judges on the Fourth Circuit, at the time this petition for further rehearing en banc was under consideration, was eight.

Petitioners addressed their rehearing request to various jurisdictional, statutory and practical objections to the equally divided en banc order of July 20th. Just as the Government's petition had been limited to the narrow issues resolved in the panel decision of January 11th, this petition was confined to an analysis of the procedural defects adhering to the cryptic and summary en banc order of July 20th. No attempt was made to reargue the merits of any issue that may have been involved in the July 20th order, although it was suggested that the addition of two new circuit judges might break the deadlock and thus warrant rehearing of the entire case.

In the response requested by the Fourth Circuit, the Government argued that there had been no violations of the en banc statute, § 46(c), and that petitioners "have had more than the adequate review of their contentions." Response, p. 7.

(8) On November 1, 1979, the petitioners' request for a further rehearing en banc was denied. The order merely stated that each of the judges in regular active service who was not disqualified had been polled, and that fewer than a majority of them had voted for it. See p. 12a of the appendix hereto. In denying the request for further rehearing, the Fourth Circuit was again divided equally, this time 4-4, and the November 1st order, the same as the July 20th order and judgment, was entered by an equal division of the Court. See Judge Murnaghan's remark in his dissenting "statement" that "four of my colleagues disagree with me". Appendix hereto, p. 13a, *infra*.

Circuit Judge Widener, joined again by Circuit Judge Russell, filed a dissent. They protested the practice of sending criminal defendants to jail by the vote of an equally divided vote, especially "when the means for getting a majority one way or the other is readily

available to the court." See p. 16a of the appendix hereto. The means referred to by Judge Widener are found in the dissenting "statement" of one of the new circuit judges, Judge Murnaghan. In that "statement," Judge Murnaghan offered to recuse himself from participating in any further rehearing of this case en banc. See pp. 13a-15a of the appendix hereto. On an eight-judge en banc court, such a recusal would mean that an odd number of active judges could participate. Presumably, Judge Murnaghan's offer of recusal was rejected by four of the judges of the Fourth Circuit.

REASONS FOR GRANTING WRIT

This case is both unique and important. Never before in the annals of the federal judiciary has less than a majority of participating judges sought to exercise affirmative judicial power. Never before has an equal division of active circuit judges usurped judicial power by rendering a judgment totally inconsistent with a valid panel judgment entered earlier and never vacated or withdrawn. If such unauthorized action by less than a majority of judges is left uncorrected, a most dangerous precedent will have been created. The whole notion of majority rule, so important to the effective functioning of a multi-judge appellate court system, will have been imperiled.

The importance of this case should be obvious. It is important in terms of the proper administration of the statute governing en banc rehearings, 28 U.S.C. § 46(c). And it is important to the six petitioners involved, who face severe losses of liberty and property as a result of this usurpation of power by those constituting less than a majority of active circuit judges.

En banc courts play a limited but extremely significant role in the federal judicial system. In the last five fiscal years, approximately three hundred oral hearings

before the federal courts of appeals were held en banc.[4] An appreciable but indeterminate number of those en banc hearings resulted in equal divisions, a possibility that exists whenever an even number of active judges sit en banc.

But those three hundred en banc proceedings have an importance beyond their arithmetical numbers. Like the instant proceeding, each of them is by definition a projection of the extraordinary circumstances and exceptionally important issues that justify invocation of the en banc procedure. *United States v. American-Foreign SS. Corp.*, 363 U.S. 685, 689 (1960). Thus any abuse of the en banc power necessarily affects the important case in which it arises, as well as the parties involved in such exceptional litigation.[5] An uncorrected abuse can have untold repercussions upon future en banc situations involving other issues deemed critically important.

In terms of the importance of en banc action to the individuals involved, the procedure employed in this instance by the Fourth Circuit can only be described as

[4] The Annual Reports of the Director of the Administrative Office of the United States Courts show the following fiscal year statistics as to en banc hearings in the courts of appeals:

Fiscal Year	En banc Hearings	4th Circuit En Bancs
1978	61	2
1977	48	11
1976	54	5
1975	54	7
1974	81	5
	298	30

[5] In *Moody v. Albermarle Paper Co.*, 417 U.S. 622, 624 (1974), the Court accepted and answered the certified question as to en banc procedure not only because of the intrinsic importance of that question, but also because of the importance of the problem "to the parties in the two cases pending in the Fourth Circuit."

cruel and unusual appellate justice. The six petitioners have witnessed the entry of a valid appellate judgment vacating their mail fraud and racketeering judgments of conviction. That judgment still stands, unvacated and unaltered in any way. Yet they have seen that seeming rectification of an unfair trial snatched away by an incredible 3-3 tie vote of all qualified active circuit judges. And their efforts to secure a reconsideration and breaking of that tie vote have foundered on the shoals of an even more incredible tie vote, this one 4-4.

As Mr. Justice Rehnquist has said, in his memorandum in *Laird v. Tatum*, 409 U.S. 824, 838 (1972), any affirmance by an equally divided Court is "unsatisfactory enough in a single case." When that single case is a criminal case, however, it becomes intolerable to rest the appellate assessment of the propriety of a conviction upon an equally divided vote. Society is taking one of "its most awesome steps" when it deprives "one of its members of his life, liberty or property." *Coppedge v. United States*, 369 U.S. 438, 449 (1962). When society decides to subject that deprivation to the appellate review process, that process should be meaningful. But a judicial stalemate, which means a total inability to review or assess the propriety of a conviction, is the antithesis of a meaningful appellate process. See, *Neil v. Biggers*, 409 U.S. 188, 190-2 (1972). It is an abdication, in the most unacceptable context, of "the task of a Court of Appeals to reconcile its internal difficulties . . . [and] to decide all properly presented cases coming before it . . ." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

This breakdown in appellate justice cries out for review and correction by this Court.

I. THE ISSUANCE OF A WRIT OF MANDAMUS IS NECESSARY TO INSURE THAT COURTS OF APPEALS OBSERVE THE "FUNDAMENTAL REQUIREMENTS" OF THE EN BANC STATUTE, 28 U.S.C. § 46(c).

It is both appropriate and necessary to issue a writ of mandamus in aid of this Court's responsibility to supervise the proper administration of the en banc statute, 28 U.S.C. § 46(c).

In *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 624-625 (1974), the Court reiterated the ruling in the *Western Pacific Railroad Case*, 345 U.S. 247, 250, 259 (1953), that § 46(c) is "a grant of power to the courts of appeals to order hearings or rehearings in banc, not the creation of a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing." The right of a litigant, in other words, goes "no further than the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 5 (1963).

Section 46(c) allows courts of appeals a vast amount of discretion in setting up administrative machinery for executing the en banc power. But the writ of mandamus here sought does not seek to control or interfere with such discretion. Rather the mandamus request seeks to confine the exercise of en banc power by the Fourth Circuit within the bounds set by § 46(c). That is a matter of judicial power, not of a litigant's right.

As the Court observed in *Western Pacific*, at 260, "If § 46(c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals." And in the exercise of the Court's general power to supervise the administration of justice in the federal courts, including the administration of en

banc justice, "the responsibility lies with this Court to define those requirements and insure their observance." *Ibid.*

Thus when a serious problem arises as to whether a court of appeals has observed all these "fundamental requirements" of § 46(c), the issue is not one of inquiring into the exercise of judicial discretion or into the possible violation of a litigant's right. It is an exercise in delineating and enforcing those fundamental judicial requirements, requirements that reflect the content and extent of the statutory commitment of "the *en banc* power to the majority of active circuit judges." *Western Pacific,* at 261. Matters of judicial power, like matters of jurisdiction, must be assessed in absolutist terms. That is why mandamus is so well suited to making such an assessment.

In the past, the Court on occasion has used certiorari as a vehicle for supervising the administration of the en banc requirements of § 46(c). Thus in *Western Pacific,* at 250, certiorari was granted because "we deemed it important to resolve the *en banc* questions precipitated by this litigation." The Court has also exercised such supervision by answering a certified question about the administration of § 46(c) from a court of appeals, a question that was deemed important "to the administration of judicial business in the circuits, as well as to the parties in the two cases pending in the Fourth Circuit." *Moody v. Albemarle Paper Co., supra,* 624. But because the "fundamental requirements" of § 46(c) are so divorced from the rights of litigants and are so exclusively matters of judicial power, petitioners here suggest that the writ of mandamus may be the most appropriate procedure to test whether the equal division of the active Fourth Circuit judges have exceeded their en banc powers.

Should this Court feel, however, that mandamus is not an appropriate proceeding for addressing the en banc problem in this case, petitioners suggest that this petition for writ of mandamus be treated as a petition for certiorari. Review of the en banc problem should then be granted on that basis. See, e.g., *Collier v. United States*, 382 U.S. 890 (1965).

II. THE EXCEPTIONAL CIRCUMSTANCES IN THIS CASE JUSTIFY INVOCATION OF THIS COURT'S POWER UNDER 28 U.S.C. § 1651(a) TO ISSUE AN ORIGINAL WRIT OF MANDAMUS.

The issuance of an original writ of mandamus, under the circumstances, comes squarely within the jurisdictional corners of the All Writs Statute, 28 U.S.C. § 1651(a). The prime and traditional justification for issuing mandamus pursuant to § 1651(a) has always been "to confine an inferior [federal] court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967), quoting from *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). In this case, mandamus is sought to confine the en banc Fourth Circuit, or at least an equal division thereof, to a lawful exercise of the en banc judicial power conferred by § 46(c).

As developed more fully hereinafter, mandamus is sought on the premise that § 46(c) confers no affirmative judicial power on an equal division of active circuit judges. That section confers such power only on a majority of the active judges. Anything less than a majority, whether it be an equal division or a minority, has no judicial power (a) to ignore or vacate an outstanding prior judgment of a panel of the court, or (b) to affirm or reinstate judgments of conviction that stand vacated by the terms of that prior panel judgment.

Thus in the context of an en banc rehearing of an unvacated panel judgment, an equal division of active judges can do no more than affirm the panel judgment that is before it for reconsideration. Any attempt by the equal division to do more constitutes what the *Will* and *Roche* decisions describe as a judicial "usurpation of power." Such usurpation is the historic reason for issuing a writ of mandamus.

Moreover, issuance of a mandamus writ in this instance would fully satisfy the § 1651(a) requirement that such issuance be in aid of this Court's appellate jurisdiction. Its issuance, in other words, would be "in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *Ex parte United States*, 287 U.S. 241, 246 (1932). The unauthorized action of the equal division of the en banc court in affirming the judgments of conviction rather than the prior unvacated judgment of the panel has effectively defeated this Court's appellate jurisdiction over that panel judgment. The panel's lengthy opinion accompanying that judgment, dated January 11, 1979, has been fully reported at 591 F.2d 1341.

A more complete destruction of this Court's jurisdiction to review that panel decision of January 11th would be difficult to imagine. Had the en banc court acknowledged that the panel decision has never been vacated and that the rehearing thereof had failed by an equally divided vote, this Court's jurisdiction to review that decision on certiorari would have remained intact. The Court, on petition by the Government, could have reviewed the judgments of conviction in light of the various reversible errors articulated in the panel's opinion.

Since the panel's judgment of January 11th has not been vacated or withdrawn, in whole or in part, it remains subject to certiorari review. But review is hindered unless and until the equally divided en banc judgment of July 20, 1979, is declared void as a "usurpation of power." That July 20th order, which carries with it no explanatory opinion, purports to dislodge and replace the otherwise reviewable panel judgment of January 11. But the reviewability of that July 20th order is no substitute for review of the January 11th judgment. The two judgments cover different matters, and while one is accompanied by a written opinion, the other is not. Regardless of how reviewable the July 20th order may be, moreover, its very entry interferes with review by this Court of the panel judgment of January 11th. Mandamus is designed to remove and invalidate such unauthorized action.

There can be no question that mandamus is not here sought as a substitute for some other available mode of review of the panel judgment and opinion of January 11th. See, *Ex parte Fahey,* 332 U.S. 258, 259-60 (1947); *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 384-85 (1953). A writ of mandamus in these circumstances would be in aid of this Court's jurisdiction to review the January 11th decision.

This Court has often said that the remedy of mandamus "is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). This is an extraordinary situation. An equal division of an en banc court has sought to exercise judicial powers that § 46(c) commits only to a majority of the active circuit judges. This attempted "usurpation of power" demands "drastic" correction by way of mandamus.

III. IMPORTANT AND UNIQUE PROBLEMS IN THE ADMINISTRATION OF THE EN BANC REHEARING PROCEDURE, AUTHORIZED BY 28 U.S.C. § 46(c), ARE PRESENTED BY THIS CASE.

Several important questions emerge from the per curiam order of July 20, 1979, wherein the judgments of conviction entered in the District Court were affirmed "by an equally divided court." Those questions reflect some of the "fundamental requirements" of the en banc statute, 28 U.S.C. § 46(c), requirements that depend upon this Court for ultimate delineation and enforcement. *Western Pacific Railroad Case,* 345 U.S. at 260.

At the outset, it must be remembered that the panel decision of January 11th was in legal and statutory effect the decision of the Fourth Circuit. Under 28 U.S.C. § 46(c), most cases are heard and determined "by a court or panel of not more than three judges." And when a court of appeals does sit as a panel or division of three judges, "the division [or panel] constituted the court" for purposes of hearing and deciding the appeal. *Bradley Mining Co. v. Boice,* 205 F.2d 937, 938 (9th Cir. 1953).

In asking the questions about the propriety of the en banc order of July 20th, one must keep in mind that the July 20th affirmance of the judgments of conviction was made with full knowledge and awareness by the Fourth Circuit that on January 11th the court, sitting as a panel of three judges, had vacated those very same judgments of conviction. The July 20th action was taken with the further knowledge and awareness that the January 11th judgment of "the court" had in no way been vacated, withdrawn or altered by "the court." There was no order of "the court," and no rule promulgated by the Fourth Circuit, that had the effect of automatically vacating or withdrawing the January 11th judgment of "the court" upon the grant of rehearing en banc.

In that context, the following questions of judicial power arise from the July 20th en banc action:

1. *Does § 46(c) commit any kind of en banc rehearing power to an equally divided en banc court?* The answer to that question must be "no," for the en banc power conferred by § 46(c) is committed only "to the majority of active circuit judges." *Western Pacific,* at 247. As Judge Maris once wrote, in language quoted with approval by the Court in *United States v. American-Foreign SS. Corp.,* 363 U.S. at 689-90, the main purpose of § 46(c) is to enable a court of appeals "to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions." Maris, *Hearing and Rehearing Cases in Banc,* 14 F.R.D. 91, 96 (1954).

Hence any group of active circuit judges constituting less than a majority can execute none of the en banc rehearing powers expressed in § 46(c). By themselves or in an evenly divided group, less than a majority of the judges cannot effectuate a rehearing en banc, vacate or overturn a prior judgment of "the court," or enter a judgment inconsistent with that previously reached by "the court." They are not charged, in other words, with the § 46(c) duties relative to "the administration and development of the law of the circuit." *United States v. American-Foreign SS. Corp., supra,* at 689. To the extent the July 20th en banc order reflects an effort to perform such duties or to achieve such results, it must be considered a usurpation of judicial power and hence void.

2. *What judicial action can an evenly divided court then take with respect to rehearing en banc a prior determination of the court?* Since such a division has no judicial power to effectuate a rehearing en banc, the division can only act so as to indicate that the purpose

of the rehearing has failed, and that the prior judgment as to which rehearing was sought must be summarily affirmed. In the present case, in failing to recognize that they had no judicial power to affect the unvacated panel judgment, the equal division of the Fourth Circuit placed itself squarely in conflict with the holding of the Court of Appeals for the District of Columbia Circuit in *Bulluck v. Washington*, 468 F.2d 1096, 1122 (1972).

In *Bulluck*, as in this case, a court of appeals granted en banc rehearing without vacating the panel judgment. The en banc court, finding itself equally divided after the rehearing, recognized that the equal division was powerless to affect the panel judgment and that the only proper course was for the order granting rehearing to be set aside. In so doing, the court stated:

> "The Court is equally divided as to whether the judgment of the District Court should be affirmed. The order of March 7, 1972, granting rehearing en banc, did not vacate the judgment of the division entered January 19, 1972, and the opinions filed that date. Any action of the Court en banc can neither affect the judgment of affirmance, nor provide an authoritative exposition of pertinent legal doctrine. Accordingly, it is
>
> "Ordered by the Court en banc that the order of March 7, 1972 granting rehearing en banc is hereby vacated, and the judgment of affirmance entered January 19, 1972, by the division remains in effect." 468 F.2d at 1122.

The holding in *Bulluck*, moreover, is in accord with the rule of *Carmichael v. Eberle*, 177 U.S. 63, 66 (1900), where it was indicated that when a territorial court divided equally after hearing oral argument on a petition for rehearing, the equal division was tantamount to a denial of the rehearing.

3. *Why does not the equally divided en banc order of July 20th constitute, as it states, an affirmance of the*

judgments of conviction entered in the court below? The July 20th order to that effect reflects a basic confusion between hearings en banc and rehearings en banc, both of which are encompassed by § 46(c). Where the original hearing of an appeal is en banc, the judgment under review is that of the court below. Under such circumstances, as this Court said long ago in *Durant v. Essex Co.*, 7 Wall. 107, 112 (1869), "If the judges are divided, the reversal cannot be had, for no order can be made . . . The judgment of the court below, therefore, stands in full force."

But a rehearing en banc is addressed not to a judgment of the court below but to a prior judgment rendered by the appellate court itself. Unless and until that prior appellate judgment is somehow vacated or removed, the en banc rehearing tribunal can never address the judgment of the court below. An equal division on rehearing en banc of a prior and unvacated appellate judgment can only mean, in the words of *Durant v. Essex Co.*, that reversal of that prior appellate judgment cannot be had and that such a judgment therefore "stands in full force."

The Fourth Circuit's order of July 20th is patently based on the rule in *Durant v. Essex Co.* respecting original hearings en banc. To cover rehearings en banc, the rule must be restated to provide that the last extant judgment undergoing en banc rehearing cannot be reversed on an equal division; that judgment then "stands in full force." If that extant judgment happens to be a judgment rendered by a panel of the appellate court, then the equal division must result in an affirmance of that judgment.

As thus restated, the rule announced in *Durant v. Essex Co.* was patently violated in the entry of the July 20th en banc order. The equally divided court simply ignored the only extant judgment before it on rehearing

en banc, the judgment of the court panel rendered on January 11th. It assumed, incorrectly, that the judgments of conviction entered in the District Court were before it, as if this were an original hearing en banc of petitioners' appeals from those judgments of conviction. Nothing in § 46(c) permits such a cavalier readjustment and reordering of the subject matters involved in the rehearing en banc.

4. *Does the action of a majority of active circuit judges in granting a rehearing en banc constitute a withdrawal or vacation of the prior court judgment as to which rehearing is sought?* By itself, such an order granting rehearing en banc means only what it says, i.e., that a rehearing of a specified judgment will be had en banc. Nothing in § 46(c) compels any conclusion or implication that the specified judgment is thereby vacated, or that the case is restored to the argument calendar as though it were to be heard originally en banc.

The rules and practices adopted in certain other Circuits that have confronted this problem are confirmatory of the impotency of a mere order granting rehearing en banc to achieve a withdrawal of the court order to be reheard en banc. Four Circuits have adopted and published, by majority vote, local rules or operating procedures whereby the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the court and to restore the case on the docket as an original appeal pending before the en banc courts.[6] These local rules have a two-fold effect. The first is to cause the judges of those circuits to vote for rehearing

[6] The Third, Fifth, Sixth and Seventh Circuits have adopted such rules or practices: Third Circuit Internal Operating Procedures, Part O(3)(f), and see Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 95 (1953); Fifth Circuit Rule 17; Sixth Circuit Rule 14(a); Seventh Circuit, Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (1979 ed.), p. 48.

only in those cases in which they determine, in the first instance, that the panel judgment must be set aside.[7] The second is to discharge the obligation of the circuit, with respect to its en banc procedure, that, "whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . ." *Western Pacific,* at 268.

In the majority of the circuits there are no such local rules. In two of these Circuits the courts have either, as in *Bulluck,* permitted unvacated panel judgments to remain or, on a case-by-case basis, they have entered separate orders to vacate panel judgments either simultaneously with, or subsequent to, the entry of the orders granting rehearing en banc.[8]

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[7] Prior to its adoption of Rule 17, the Fifth Circuit's practice was to await the outcome of the en banc rehearing and if the result was to reverse the prior panel ruling, then to enter an order vacating and overruling the panel judgment and to address directly the judgment of the lower court. See, *Weissinger v. United States,* 423 F.2d 795, 796 (5th Cir. 1970).

[8] The two Circuits that have followed this practice are the District of Columbia Circuit and the Second Circuit. See, e.g., *Bulluck v. Washington,* 468 F.2d 1096 (D.C. Cir. 1972); *Drake Bakeries, Inc. v. Local 50, etc.,* 294 F.2d 399 (2d Cir. 1961), rev'd on other grounds, 370 U.S. 254 (1962); *American-Foreign SS. Corp. v. United States,* 265 F.2d 136, 144 (2d Cir. 1958). This was also the practice of the Fifth Circuit prior to the adoption of its Rule 17. See footnote 7, *supra.*

In the *Drake Bakeries* case, *supra,* the Second Circuit divided equally on rehearing the case en banc. To effectuate an affirmance of the district court's order, one of the three judges who voted to reverse the district court changed his vote to produce a 4-2 vote to withdraw the panel decision. This matter was one of the questions presented to this Court in the ensuing petition for certiorari, i.e., whether the even division of the active judges upon rehearing en banc affirmed the panel decision or the district court decision. *Drake Bakeries, Inc. v. Local 50,* 368 U.S. 975 (1962), petition for certiorari, p. 2. But after certiorari was granted on this and another point, petitioner abandoned the en banc point and neither briefed nor argued it. 370 U.S. 254, 255, n.1 (1962).

The Fourth Circuit has no local rule or known internal practice that automatically vacates the prior court judgment upon entry of an order granting rehearing en banc. Its case-by-case practice has been ambivalent. On occasion, where a clear majority of an en banc court wished to reach a different result from that of the panel, the Fourth Circuit has been careful to vacate the inconsistent panel judgment before dealing with the ruling below.[9] Yet on other occasions an equally divided Fourth Circuit has seemingly affirmed a district court judgment, after a panel judgment of reversal, without referring to or vacating the prior panel judgment.[10] The proceeding below in this case appears to fall within the latter category of Fourth Circuit actions.

The decisions of state courts that have dealt with the problems are consistent with the federal rule that seems to prevail in all but the Fourth Circuit. That rule, as expressed by the Florida and North Carolina Supreme Courts, is that, where the order for rehearing does not expressly vacate the prior appellate court judgment, an equal division on rehearing leaves the prior judgment intact, since the equal division results in an inability to reverse or set it aside.[11]

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[9] See, *United States v. Bethlehem Steel Co.*, 323 F.2d 655 (4th Cir. 1963); *Bernstein v. Nationwide Mutual Ins. Co.*, 458 F.2d 506 (4th Cir. 1972).

[10] See, e.g., *Bishop v. Wood*, 498 F.2d 1341 (4th Cir. 1974), aff'd 426 U.S. 341 (1976); *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976), *United States v. Kimes*, 458 F.2d 36 (4th Cir. 1972).

[11] See, *Pitton v. Atlantic Coast Line R.R.*, 198 So. 503 (Fla. 1940), 131 ALR 1003; *Wells v. Davis*, 145 Fla. 17, 198 So. 838 (1940); *Caples v. Taliaferro*, 146 Fla. 154, 200 So. 378 (1941); *Samuels v. Bowers*, 232 N.C. 522, 61 S.E.2d 448 (1950); *Best & Co. v. Maxwell*, 217 N.C. 134, 6 S.E.2d 893 (1950), rev'd on other grounds, 311 U.S. 454 (1951); *Carolina Power & Light Co. v. Merrimack Mutual Fire Ins. Co.*, 240 N.C. 196, 81 S.E.2d 404 (1974).

The sum of the en banc rehearing practices in jurisdictions that have confronted the problem, save for the Fourth Circuit on occasion, is that the mere entry by a majority vote of an order granting rehearing en banc does not suffice to vacate the prior appellate ruling to be reheard. Setting aside such a ruling necessitates some form of majority action by the active circuit judges, be it by specific court order or by a general rule of court. But whatever the mode of expressing such majority action, the point remains that majority inaction with respect to vacating a prior court judgment cannot do service for a specific rule or court order. If the majority rule embodied in § 46(c) is to be respected, that majority must clearly and unmistakably express itself.

All the answers to the foregoing questions must be in the negative. There is no justification for the Fourth Circuit allowing an equal division to ignore unvacated judgments and to substitute diametrically different judgments in their stead. The notion that an equally divided appellate court has no power to reverse the judgment under reconsideration is even more blatantly violated when an equally divided court attempts to leapfrog over an existing judgment setting aside a criminal conviction and to affirm the conviction instead. In that situation, the district court judgment of conviction cannot be before the en banc court for rehearing purposes unless and until the judgment setting aside the conviction has somehow been removed by some form of majority action.

Finally, it must be emphasized that an equal division on an en banc rehearing is the antithesis of the policy and purpose of the en banc statute § 46(c). That policy, of course, is to give to the majority of the active circuit judges the power to administer and develop the law of the circuit and to determine the major doctrinal trends of the future of their court. See, *United States v.*

American-Foreign SS. Corp., supra, at 689-90. It ill serves that noble purpose for an en banc court to enter a meaningless judgment that settles no law for the circuit and determines no major doctrinal trends.[12]

That appears to be the inevitable by-product of a usurpation of judicial power by judges unable to command the votes of a majority of the active circuit judges.

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[12] The First Circuit has given effect to the majority rule policy of § 46(c) in its Rule 16(f), which promises that if a petition for rehearing en banc is granted, "the ultimate decision will be that of the majority of the active judges."

CONCLUSION

For these various reasons, this petition for a writ of mandamus should be granted.

Mandamus should issue to the Fourth Circuit judges qualified to sit en banc in this proceeding, commanding them (1) to vacate the en banc's per curiam order and judgment of July 20, 1979, to the extent that it purports, by an equally divided vote, to affirm the judgments of conviction entered by the District Court for the District of Maryland, and (2) to reaffirm and give effect to the prior panel judgment of the court, dated January 11, 1979, that had vacated those judgments of conviction and ordered a new trial.

Respectfully submitted,

ARNOLD M. WEINER,
RICHARD V. FALCON,
36 South Charles Street,
Baltimore, Md. 21201,
Counsel for Marvin Mandel,
Petitioner, and of Counsel
for Petitioners,

EUGENE GRESSMAN,
School of Law,
Univ. of North Carolina,
Chapel Hill, N. C. 27514,
Of Counsel for Petitioners.

M. ALBERT FIGINSKI,
Counsel for Marvin Mandel, Petitioner
WILLIAM G. HUNDLEY,
Counsel for W. Dale Hess, Petitioner
THOMAS C. GREEN,
Counsel for Harry W. Rodgers, III, Petitioner
MICHAEL E. MARR,
Counsel for William A. Rodgers, Petitioner
NORMAN P. RAMSEY,
WILLIAM F. GATELY,
Counsel for Irvin Kovens, Petitioner
CHARLES G. BERNSTEIN,
WM. BRADFORD REYNOLDS,
Counsel for Ernest N. Cory, Jr., Petitioner

APPENDIX

JUDGMENT

(Filed January 11, 1979)

United States Court of Appeals
for the Fourth Circuit

No. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel,
Appellant.

Appeal From the United States District Court for the District of Maryland.

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of acquittal on Count 23 of the indictment are affirmed. The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are vacated and remanded for a new trial; the order of forfeiture is also vacated and remanded consistent with the opinion of this Court filed herewith.

WILLIAM K. SLATE, II
Clerk.

JUDGMENT
(Filed July 20, 1979)

United States Court of Appeals
for the Fourth Circuit

No. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel,
Appellant.

Appeal from the United States District Court
for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

In consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II,
Clerk.

ORDER

(Filed July 20, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,

Appellee,

v.

Marvin Mandel, et al.,

Appellants.

PER CURIAM:

The judgments of conviction are affirmed by an equally divided court.

A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.

Affirmed.

DISSENTING OPINIONS

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for all of the reasons discussed in the majority opinion of the panel. *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), and would add the following additional comments.

I

The point of difference on which the en banc court is evenly divided relates to the denial by the trial judge of requested instructions. As indicated in the panel opinion, I would have reversed because of what I consider error in failing to give a bribery instruction in connection with the mail fraud counts of the indictment, and also for failure to give an instruction concerning Governor Mandel's knowledge of other defendants' financial interests. Without deemphasizing the latter, I think that affirming despite the lack of a bribery instruction for the mail fraud counts is so far from settled precedent that the reasoning should be stated in the opinion of the court. On that account, I state my reasons for considering such denial reversible error.

The mail fraud counts of the indictment had for a substantive basis a charge of bribery. However carefully one may comb the record, one can unearth no basis for wrongdoing by *all* the defendants,[1] which would be violative of the mail fraud statute, other than the charge of the acceptance on the part of defendant Mandel and the giving by the other defendants of a

[1] As the panel opinion pointed out, there were two bases shown by the evidence on which the prosecution for mail fraud in this case could have been pursued: bribery and concealment or misrepresentation of material information. However, evidence of Governor Mandel's connection with the alleged concealment or misrepresentation scheme was tenuous at best.

bribe or bribes. It is clear that such bribery was an essential element of the crime stated in the mail fraud counts of the indictment.[2]

Such was the construction given the indictment at the first hearing before Judge Murray, when one of the issues was a construction of the charges in the indictment. Judge Murray's ruling on this point was clear:

> "While the factual allegations in the indictment make the scheme appear to be a complex and subtle one, the thrust of the charges is simple. In essence, the indictment charges that the defendants devised a scheme to defraud the citizens and the state of Maryland by *bribing* the Governor to assist legislation which would be financially beneficial to the owners of Marlboro. . . ." *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976) (Emphasis added).

And that ruling accorded with the position taken by the government itself at the hearing.

At the first trial, the government asserted that bribery was at the heart of its mail fraud prosecution. Thus, counsel for the government at that trial stated to the jury:

> "Ask yourselves the question, as the evidence comes in, did the benefits that these men were giving to Marvin Mandel really have nothing to do with the benefits that they wanted to get out of the State Government and that to a substantial extent they were getting out of the State Government because that is the question *ultimately* that you are going to have to be deciding." (Emphasis added)

And throughout and until the end of the second trial, although the government may have begun to shift its

[2] Paragraph 27 of count 1 of the indictment alleged that "*Marvin Mandel* would and did . . . *in return for* financial and other benefits . . . act with intent to aid and assist certain legislation and legislative matters financially beneficial to the owners of Marlboro Race Track" (emphasis added). I think this is an accusation of bribery, pure and simple.

position with regard to bribery in connection with the mail fraud counts of the indictment, it continued to emphasize the importance of bribery in connection with those counts by introducing a mass of evidence on the alleged flow of benefits to Governor Mandel from the other defendants in return for official preference, without limiting such evidence to the racketeering counts of the indictment. The pervasive influence of bribery on the whole case is shown by the charge of the trial court to the jury with respect to the mail fraud counts, when, although it had just refused the bribery instruction of the defendants with respect to the mail fraud counts, in stating the charge against the defendants, it related the charge that Governor Mandel had not performed his office "free from bribery." The government at that time did not disclaim the bribery charge, as in fact it should have as a matter of common fairness if indeed it had abandoned the charge. Rather, it stayed silent when it had a duty to speak, and thus had its cake and ate it too.

Despite all this background, the government strenuously objected to any bribery instruction in connection with the mail fraud counts, as requested by the defendants at the conclusion of the testimony. Contrary to the position taken by it essentially at all times prior, the government argued that bribery was not an element of the mail fraud charges and that it was improper to include a bribery instruction in connection with the mail fraud counts. The trial judge accepted this argument and denied the requested instruction.

Even in argument to the jury, counsel for the government argued that bribery was not relevant to the mail fraud counts. They did this on the basis of the trial judge's ruling denying defendants' requested instruction.

On this appeal, however, the government has made a complete flip-flop. It now concedes — contrary to its argument to the trial judge at trial, not to mention to the jury — that bribery is included in the charge under

the mail fraud counts. But, contrary to its position at trial when it induced the trial judge to deny the defendants' request for a bribery instruction, it argues on this appeal that there was no error in the denial of an instruction on bribery under the mail fraud counts because:

(a) The trial judge did define bribery in connection with the racketeering counts and this was sufficient (1) to tell the jury what bribery was and (2) to tell the jury that bribery was included in the mail fraud counts (even though the trial judge specifically refused to so instruct the jury at the instance of the Government itself); and

(b) The trial judge did tell the jury, in summarizing the positions of the parties, that the defendants denied bribery.

This argument was accepted by those of my brothers who would affirm the judgment.

I cannot accept the argument. The government cannot blow hot and cold at the same time. It cannot argue that bribery is not involved in the mail fraud counts at trial and secure a ruling to that effect from the trial judge in connection with the jury instructions and use that ruling as a basis for the argument to the jury that the "whole concept of bribery is relevant only in Counts 21 and 23" (the racketeering counts), and then on appeal shift completely its position and contend that an instruction on bribery was to be treated as having been given, even though such an instruction was not only not included in the instruction on the mail fraud counts but had been specifically ruled to be improper. I cannot agree to such sophistry in a case where a defendant's right to a fair trial is involved.

The government and the trial judge agreed that bribery was an element in the crime charged in the racketeering counts. For that reason, a bribery instruction was given in connection with those counts. Neither the government nor the trial judge thought it sufficient

to omit such an instruction simply because the trial judge had stated the conflicting positions of the parties. But when the trial court gave its instructions on the mail fraud counts, it *purposely* omitted any instruction on bribery. Would not a jury be expected to notice the contrast between the instructions on the mail fraud and racketeering counts? Would it not be reasonable for the jury to assume under these circumstances that bribery was in no way related to the mail fraud counts? And would not this be especially so in view of the argument made by the government counsel, fresh in the minds of the jury, that bribery was irrelevant to the mail fraud counts?

This is an involved case. The prosecution rests on fragmented circumstances, many of the more essential ones being no more than mere rumor and legislative corridor gossip. In such a case, is not a defendant entitled to precise instructions? What was done here was, however, more likely to confuse and mislead than to provide clear guidance for the jury. And that should entitle the defendants to a new trial. The error is not insubstantial; it is fundamental.

I further note that it was not explicitly noted in the panel opinion that a criminal defendant is entitled to an instruction on any theory of defense for which there is a foundation in the evidence, and that a refusal to so instruct is reversible error. Because that principle is so universally recognized and accepted, I should have believed it required no mention or citation. However, since the affirmance of the defendants' convictions must reject this time honored principle, I should point out that every circuit, including this court, has embraced the principle that a criminal defendant is *entitled* to an instruction on any theory of defense for which there is a foundation in the evidence. See, e.g., *United States v. Swallow,* 511 F.2d 415, 523 (10th Cir. 1975), cert. den., 423 U.S. 845; *United States v. Mitchell,* 495 F.2d 285, 287-88 (4th Cir. 1974); *United States v. Noah,* 475 F.2d 688, 697 (9th Cir. 1973), cert. den., 414

U.S. 1095; *United States v. Dana,* 457 F.2d 205, 208 (7th Cir. 1972); *United States v. Blair,* 456 F.2d 514, 520 (3d Cir. 1972); *United States v. Leach,* 427 F.2d 1107, 1112 (1st Cir. 1970), cert. den., 400 U.S. 829; *United States v. Blane,* 375 F.2d 249, 252 (6th Cir. 1967), cert. den., 389 U.S. 835; *Perez v. United States,* 297 F.2d 12, 15-16 (5th Cir. 1961); *Apel v. United States,* 247 F.2d 277, 282 (8th Cir. 1957); *United States v. O'Connor,* 237 F.2d 466, 474, n.8 (2d Cir. 1956); *Tatum v. United States,* 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (D.C. Cir. 1951). The district court's refusal to give the substance of defendants' requested instructions on bribery and knowledge in connection with the mail fraud counts of the indictment clearly violated this principle.

The additional remarks I have made as to the sufficiency of the jury instructions should be read in light of the fact that the panel opinion carried the mail fraud statute near its outer limits, and some cases may arguably indicate beyond. See *Hammerschmidt v. United States,* 265 U.S. 182 (1924). Especially in view of that, it would have been far preferable for the district court to have charged the jury on the only two theories upon which a conviction could have been sustained, concealment or misrepresentation of facts and bribery. This, it did not do, and, assuming that is not reversible, it went further and rather than charge the jury with the law as it applied to the case, it charged the jury as to the contentions of the parties and even refused the defendants' proffered charges, as this dissent and the panel opinion note.

Accordingly, I am unshaken in my belief that the jury was inadequately and prejudicially charged in this case.

II

With respect to the hearsay issue, I add only the following quote from *Kotteakos v. United States,* 328 U.S. 750, 761 (1945):

> "What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.
>
> "Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, *Weiler v. United States, supra,* or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. It is of course highly technical to confer full legal status upon one who has just attained his majority, but deny it to another a day, a week or a month younger. Yet that narrow line, and many others like it, must be drawn. The 'hearsay' rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories."

The hearsay and double hearsay evidence relating to comments allegedly made on the floor of the Maryland Senate, which was the only direct evidence of Governor Mandel's feelings on the veto override, fall precisely within the categories of "gossip, rumor, unfounded report, second, third, or further hand stories," *Kotteakos* decries. They simply do not possess the requisite guarantees of trustworthiness required by Federal Rule of Evidence 802(24).

III

Finally, I note that there are a number of issues raised in this case which are not dealt with in the majority en banc opinion. Discussion of these issues was unnecessary in the majority panel opinion since a new trial was required in all events.

Now, a majority of the court affirms the convictions on all grounds except the jury instructions, on which point the court is evenly divided. I question its decision not to discuss any of the remaining issues raised on

appeal, some of which may present possible grounds for reversal.

For the reasons stated above and in the panel opinion, I respectfully dissent.

I am authorized by Judge Russell to state that he joins in this opinion.

ORDER
(Filed November 1, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

Upon consideration of the defendants' petition for another rehearing before the *en banc* court and the response of the United States, each of the judges in regular active service who is not disqualified having been polled, and it appearing that fewer than a majority of them have voted for it,

IT IS NOW ORDERED that the petition for another rehearing *en banc* before the enlarged court be, and it hereby is, denied.

For The Court:

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

October 30, 1979.

STATEMENT WITH RESPECT TO DENIAL OF FURTHER HEARING

(Filed November 1, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

MURNAGHAN, Circuit Judge:

This statement is not lightly made. It appears only after reflection, and despite considerations which would normally preclude its seeing the light of day. First, one customarily does not announce a dissent from court action which is taken by vote and without opinion. Second, my past tangential contact with this case while a practicing lawyer would, in ordinary circumstances, dictate that I should recuse myself to avoid the appearance of even the slightest possible bias. Third, close association with the other members of this Court, short though it has been, has already thoroughly confirmed my earlier impression of the dedication, skill, compassion and concern for the Court as an institution of each of the members. The fact that four of my colleagues disagree with me is strong indication that my views may be wrong. Those considerations have not deterred me only because of a strange certainty, transcending the ordinary confidence one has in one's

convictions, that the Court's failure to decide this case constitutes a serious injustice.

It is nearly as important that cases be decided, and the decisions be accorded finality, as it is that they be disposed of absolutely correctly. Courts have, as a consequence, adopted a rule of necessity that an evenly divided appellate court, although it cannot render a decision, affirms the judgment. The unsatisfactory nature of such a decisionless result is reflected, however, in the rule that judgments of equally divided courts are not accorded precedential value. The rule of necessity has, however, no scope for application here. The even division which would normally bring the rule into play is not present when the even division coincides with an expansion of the court's membership. Judge Sprouse and I had joined the Court by the time it considered and acted on the petition for further rehearing.

So I regret the denial of that petition, the granting of which would avoid a situation so frustrating to defendants who have made arguments sufficient to persuade three members of the Court (that is one-half of those who participated in rehearing) that reversal and a new trial are required, if justice is to be accomplished. The defendants and the public generally, in whose service the courts operate, are entitled to a decision of this Court, whether it leads to reversal and a new trial, or whether, through affirmance, it gives requisite certainty and finality to the convictions. This was no ordinary case. Its consequences on the entire political system of the State of Maryland are enormous. It cries out for a proper resolution, where such a resolution is possible.

It would, of course, avail nothing, if yet another rehearing were to result only in a new deadlock. Since an even number of judges has been added to the Court, the danger of a fresh deadlock seems at first a large one, especially in light of the closeness of the issues, a closeness which is evidenced by the splits in both the

panel and the *en banc* court. As things are situated, however, another even division could not occur because any reargument of this case would be heard by an odd number of judges.

Enabling a court to reach a decision is not sufficient reason, standing alone, for a judge to recuse himself or herself. If it were, then, since all judges would be equally subject to the duty to recuse, evenly divided courts would effectively decide cases by lot, or some other arbitrary process, as they selected one of their members for recusal. Nor is preserving the decision making ability of a court sufficient reason for judges to fail to fulfill an otherwise clear obligation to disqualify themselves. But when grounds for a judge's recusal exist, but are ones related to appearances rather than actualities, impact on the court's decision making ability is a factor which the judge should take into account in deciding whether or not to participate. Another rule of necessity is then at work. The appearance of justice suffers far greater damage from a court's unnecessary inability to reach a decision than it does from the participation of a member of the court for whom there are palpable but far-fetched possibilities of bias. Since the reasons why I might recuse myself are of such a tenuous and speculative nature,[1] they would be outweighed by the importance of the court's being able to reach a decision. The court would thus be assured that, whether or not Judge Sprouse had to recuse himself, an odd number of members would participate in any rehearing of this case *en banc*. If he did not recuse himself, I would. If he did recuse himself, I would sit.

For these reasons, I feel compelled respectfully to express my dissent from the decision not to hold a further *en banc* rehearing. To the extent necessary to

[1] While in private practice, I represented two clients, on whose behalf I obtained intervention at the trial level, to contest rulings on the availability of news items emanating from the case, in one instance, and to resist an attempted confiscation of property by the Government, in the other.

permit that expression, I refrain from disqualifying myself.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent from the failure of the court to grant further *en banc* consideration in this case for the reasons expressed in my two opinions previously filed.

In addition, Judge Murnaghan's conditional disqualification now makes it certain that the case can be heard by an uneven number of judges. We know that on one important issue the court was divided 3 to 3, so a rehearing would have to result in a majority vote, one way or the other.

Especially in a criminal case in which people are going to jail by the vote of an evenly divided court, I have more reservations than I can overcome about sending them there without the vote of a majority when the means for getting a majority one way or the other is readily available to the court. I think the court as an institution suffers by our action, for I am not at all sure that we serve properly the appearance of justice when it is within our command so to do.

I am authorized to state that Judge Russell joins me in this opinion.